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No. 03-883

In the Supreme Court of the United States

WOLGAST CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

DAVID JOHN MASUD
Counsel of Record

KRAIG M. SCHUTTER
KATHERINE S. GARDNER
MASUD PATTERSON & SCHUTTER, P.C.
4449 FASHION SQUARE BLVD.
SAGINAW, MI 48603
(989) 792-4499

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

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PETITIONER'S REPLY BRIEF

I. The National Labor Relations Board seeks to impermissibly bypass application of Lechmere's inaccessibility rule based on the incorrect assumption that there are generally no reasonably effective means by which non-employee union officials can enforce the terms of collective bargaining agreements covering employees of subcontractors working on construction jobsites managed by general contractors.

In its "Brief for the National Labor Relations Board in Opposition," the National Labor Relations Board ("NLRB" or "Board") buttresses its arguments against Wolgast Corporation's Petition for a Writ of Certiorari with inapplicable case law and untenable rationale. In particular, the NLRB erroneously claims that Wolgast cannot challenge what the NLRB purports to be an established legal rule that union officials have no reasonably effective alternative means for policing labor contracts of subcontractors other than by direct access to the property upon which the work of union members is performed. Wolgast can and does challenge that claim. Accordingly, Wolgast submits this Reply Brief as rebuttal to the NLRB's faulty propositions and as additional assistance to this Court in properly resolving the issues presented in Wolgast's Petition for Writ of Certiorari.

In its Brief, the NLRB has presented a defense of existing Board law concerning construction site union access as understood by the Board and the Sixth Circuit Court of Appeals. It contends that CDK Contracting, 308 N.L.R.B. 1117 (1992), in which the Board ruled private property rights of a general contractor must give way to the contractual union access rights found in a subcontractor's labor agreements, strikes a proper balance between the Section 7 rights of

employees and the property interests of general contractors. The NLRB also argues that precedent from CDK Contracting is not in conflict with this Court's opinion in Lechmere v. NLRB, 502 U.S. 527 (1992), where this Court held that an employer may lawfully exclude non-employee union officials from its property absent a showing by the union that the employees with whom the union officials desire contact are otherwise inaccessible.[1]

Throughout its argument, the NLRB repeatedly refers to what it believes is an established legal precept; namely, that "there are generally no 'reasonable, effective alternative means'" by which union officials can enforce the terms of labor agreements maintained with subcontractors working on construction sites unless contractual access provisions are enforced on those jobsites irrespective of the general contractors' property rights.[2] (See Brief in Opposition, pages 3, 8 and 10). Apparently, the NLRB contends that the "heavy burden" placed on union officials to show employee inaccessibility under the Lechmere inaccessibility rule[3] is automatically met where there is a contractually enforceable union access provision with any employer on a multi-employer worksite. The NLRB goes so far as to state

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[1] Significantly, every case cited by the NLRB as support for its position that CDK Contracting is controlling law *predates* Lechmere.

[2] As support, the NLRB references a Ninth Circuit case decided a decade before Lechmere, NLRB v. Villa Avila, 673 F.2d 281 (9th Cir. 1982).

[3] The inaccessibility rule was first enunciated by the Supreme Court in NLRB v. Babcock and Wilcox Co., 351 U.S. 105 (1956) and reinstituted by the Court in Lechmere.

at page 10 of its Brief that "[Wolgast] does not challenge that particular determination by the Board, nor could it." In fact, Wolgast does challenge this alleged "determination" as having no basis in fact or in law.

As an initial matter, Lechmere did not hold, nor does Wolgast contend, that unionized employees should be without representation while on the private property of another employer. Lechmere simply does not address that issue. Instead, Lechmere speaks to the limited rights of non-employee union officials seeking access to private property rights of employers. Lechmere reaffirmed the rule that, absent employee inaccessibility, an employer cannot be compelled to allow non--employee union officials access to the workplace. This Court held at 537:

> . . . § 7 speaks to the issue of nonemployee access to an employer's property. Babcock's teaching is straightforward: §Section 7 simply does not protect non-employee union organizers *except* in the rare case where "the inaccessibility of employees makes ineffective the reasonable attempts by non-employees to communicate with them through the usual channels," 351 U.S. at 112. (Emphasis in original).

In an effort to circumvent Lechmere, the NLRB assumes as a matter of law that only non-employee union officials can adequately protect collectively bargained rights of employees and that, therefore, there are no alternative reasonable effective means to enforce the terms of collective bargaining agreements covering employees of subcontractors working on construction jobsites managed by general contractors. There simply is no basis for the rule the NLRB espouses. As an initial matter, it is significant that neither the Charging Party, the Board nor the Sixth Circuit has ever contended or

determined that the subcontractor's employees were "inaccessible" absent non-employee union officials' entry to the jobsite. Thus, the Board is substituting a presumption for what is supposed to be the union's "heavy burden" of proof. The fact is that the vast majority of "union business" can easily be conducted with employees off-site. Indeed, in the present case, the subcontractor and union officials discussed various aspects of an employee's safety concern by telephone after work the day before the union officials sought access to the jobsite (Pet. App. 5a). Moreover, the union officials testified they initially sought access to the jobsite merely to check on a couple members and to see how a new member was getting along (Pet. App. 5a, 30a). The union officials sought access the following day, in part, to "sign up a new lather" (Pet. App. 5a, 32a, 52a). Union officials have ready access to employees outside of working hours and certainly can perform "business" such as this off-site, which, in fact, they did.[4]

Even where union officials believe certain information is needed to "police" a labor agreement, the policing can be performed through investigations and reports from employees who serve as trained union stewards.[5] In the present case, the

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[4] One of the union officials testified that he met with an employee off-site the same day the employee had walked off the jobsite for what the employee thought was an unsafe scaffold (Pet. App. 51a).

[5] Union stewards are bargaining unit employees, trained by the union to be the "eyes and ears" of the union and are responsible for processing employee grievances (including investigations) and for handling other day-to-day contract administration. According to the NLRB in a case involving justification of "super-seniority" for stewards relative to layoff and recall, "it is the immediacy of attention that stewards can offer that place the stewards in such a

collective bargaining agreement found to be legally effective by the administrative law judge contained a union steward article devoted to the selection, duties and rights of union stewards, as is common in labor contracts. It read in pertinent part:

> The Employer agrees that there shall be a Journeyman working Steward on the job at all times when Carpenters are working who shall report any violation of the Agreement and perform the usual duties of the Steward with the least interference to the job. (Pet. App. 28a, 29a).

The record reveals that union officials utilized the union steward of the subcontractor working on the Wolgast jobsite for various tasks, including as a communication link with other employees relative to safety issues and routine union administrative recordkeeping (Pet. App. 50a).

Even if union stewards are not available, an employee always has access to the grievance and arbitration provisions of the collective bargaining agreement for alleged violations of the agreement (Pet. App. 28a, 29a). Similarly, if an employee believes an "abnormally dangerous condition" exists, he is protected under federal law pursuant to 29 U.S.C. 143 should he choose to walk off the job and discuss it with his union. This option is not merely hypothetical, as the record in the present case reveals that a unionized employee did, in fact, walk off the job due to his belief that a scaffold was unsafe (Pet. App. 5a, 32a, 47a, 51a). Contrary to the NLRB's assertion in its Brief, there are

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special position." Gulton Electro-Voice, Inc., 266 N.L.R.B. 406, 408 (1983).

numerous, concrete facts and circumstances demonstrating why compliance with contract provisions can be effectively monitored and protected without direct access to the jobsite by non-employee union officials. Finally, Lechmere's inaccessibility rule adequately protects union access interests on a case-by-case basis where union officials can demonstrate a specific need for access to otherwise inaccessible employees while on the property under control of the general contractor.

The NLRB is simply wrong in its contention that non-employee union officials seeking to police a collective bargaining agreement can do so effectively only if granted access to construction jobsites. Furthermore, there is no universal rule adopted by the NLRB and approved by the federal courts which gives union officials an automatic pass onto the property of a general contractor on the basis that there are, as a matter of law, no effective alternative means of policing a labor contract in such circumstances. Accordingly, the NLRB's apparent contention that union officials always meet Lechmere's inaccessibility standard in construction industry access cases should be rejected by this Court.

Respectfully submitted,

MASUD, PATTERSON & SCHUTTER, P.C.
Attorneys for Petitioner

DAVID JOHN MASUD
Counsel of Record
KRAIG M. SCHUTTER
KATHERINE S. GARDNER
4449 Fashion Square Boulevard
Saginaw, MI 48603
(989) 792-4499

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